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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN FOY, JR.,

Defendant and Appellant.

C079550

(Super. Ct. No. CRF145776)

A jury found defendant Steven Foy, Jr., guilty of willfully inflicting corporal injury upon the mother of his child (Pen. Code, § 273.5, subd. (a)),¹ contempt of court (§ 166, subd. (a)(4)), and petty theft (§§ 484, subd. (a), 488). In a bifurcated proceeding, the trial court found true the allegations that defendant had two serious and violent prior convictions (strikes) (§ 667, subd. (e)(2)) and had served a prior prison term (§ 667.5,

¹ Undesignated statutory references are to the Penal Code.

subd. (b)(1)). The trial court sentenced defendant to an aggregate term of nine years in state prison.

On appeal, defendant contends the trial court abused its discretion in denying his motion to reduce the corporal injury offense from a felony to a misdemeanor under section 17, subdivision (b). Defendant further contends the trial court abused its discretion in imposing the upper term on the corporal injury offense. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant dated Hayat Jemal “on and off” for about five years. Jemal has two children, ages six and two at the time of trial. Defendant is the father of Jemal’s youngest child.

In August 2013 Jemal obtained a criminal protective order (restraining order) against defendant after he broke her front door down and entered her apartment. The restraining order provided that defendant was prohibited from having contact with Jemal. However, several months after the restraining order was issued, Jemal resumed contact with defendant. Eventually, they began dating again. By December 2014 defendant was spending the night at Jemal’s apartment several times a week.

On the morning of December 5, 2014, defendant and Jemal were drinking hard alcohol together at Jemal’s apartment. After reading a text message on Jemal’s phone regarding her son’s father, defendant shouted at Jemal, which caused their daughter to cry. He then pushed Jemal to the floor and began hitting her “all over.” According to Jemal, defendant “wail[ed]” on her.

Shortly after the attack began, Jemal got off the ground, grabbed her daughter, and left the apartment to call 911. When the police arrived, defendant fled on foot. The officers contacted Jemal, who was crying and upset. She told the officers that defendant had assaulted her. She claimed that defendant assaulted her immediately after barging into her apartment. She also claimed that she did not know where

defendant was living at the time. At trial, Jemal explained that she lied to the police because of the restraining order. In truth, defendant and Jemal were together in the apartment when the argument developed, after which she left.

Upon returning to her apartment, Jemal noticed that her phone and some cash from her purse were missing. Approximately 20 minutes later, defendant was detained by the police. He had Jemal's phone and some cash. He also had "open wounds" on his knuckles.

Although Jemal did not seek medical care following the assault, she felt pain in her chest, arms, and most of her upper body. According to Jemal, bruises later developed on her chest and arms.² At trial, Jemal explained that she did not follow up with the police after the incident because she did not want to press charges against defendant.

Defendant was charged by information with willfully inflicting corporal injury upon the mother of his child (§ 273.5, subd. (a)), false imprisonment by force or violence (§§ 236, 237, subd. (a)), contempt of court (§ 166, subd. (a)(4)), and petty theft (§§ 484, subd. (a), 488). It was also alleged that defendant had two prior strike convictions (§ 667, subd. (e)(2)) and had served a prison term (§ 667.5, subd. (b)(1)).

A jury found defendant guilty of all the charged offenses, except for the false imprisonment offense. In a bifurcated proceeding, the trial court found the sentence enhancement allegations to be true. Prior to sentencing, the trial court denied defendant's motion to reduce the corporal injury offense to a misdemeanor under section 17,

² Photographs taken of Jemal immediately following the assault did not appear to show injuries or redness. However, the police officer that took the photographs testified that there were "dime sized" little lumps on Jemal's face, one of her eyes was swollen, and there was a wound on her neck a few inches in length.

subdivision (b).³ Thereafter, the trial court sentenced defendant to an aggregate term of nine years in state prison, comprised of the upper term of four years for the corporal injury offense, doubled to eight years for the strike priors (§ 667, (e)(2)(C)), plus one year for the prior prison term (§ 667.5, subd. (b)(1)). The court imposed concurrent terms of 180 days each on the contempt and the petty theft offenses.

Defendant filed a timely notice of appeal.

DISCUSSION

A. Motion to Reduce

Defendant contends the trial court abused its discretion in denying his motion to reduce the corporal injury offense from a felony to a misdemeanor under section 17, subdivision (b). We disagree.

A violation of section 273.5 is a “wobbler” offense because it is punishable by imprisonment in either state prison or in a county jail. (§ 273.5; see *People v. Park* (2013) 56 Cal.4th 782, 789.) Under section 17, subdivision (b), the trial court has the discretion to reduce a felony offense to a misdemeanor. (§ 17, subd. (b); see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974, 979 (*Alvarez*).) Factors relevant to that sentencing decision include the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial. (*Id.* at p. 978.)

The trial court may also consider the general objectives of sentencing as set forth in California Rules of Court, rule 4.410.⁴ These objectives are: “(1) Protecting society; [¶] (2) Punishing the defendant; [¶] (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses; [¶] (4) Deterring

³ The trial court also denied defendant’s motion to strike his prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁴ Further rule references are to the California Rules of Court.

others from criminal conduct by demonstrating its consequences; [¶] (5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration; [¶] (6) Securing restitution for the victims of crime; and [¶] (7) Achieving uniformity in sentencing.” (Rule 4.410(a).)

We review the trial court’s denial of a motion to reduce the felony conviction to a misdemeanor for abuse of discretion. (*Alvarez, supra*, 14 Cal.4th at p. 981.) “ ‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*Id.* at pp. 977-978.)

Here, the trial court declined to reduce the corporal injury offense to a misdemeanor, stating: “In this case it’s hard to even look at the nature of the offense and say that’s misdemeanor conduct [¶] The key fact in looking at the nature of the current offense . . . is that [defendant] was on probation for a domestic violence act that required him to do anger management classes and, among many other things, . . . alcohol education class[,] . . . obey all laws, and there was a criminal protective order in place. [¶] . . . [L]ooking at the nature of the offense, the fact that he was on that probation, and there was absolute total disregard for the criminal protective order and the terms and conditions of probation really tipped the balance on that factor alone. And then when you combine it with the nature of the offender, it’s really not a close call to deny the motion The defendant has a very serious criminal history and . . . he’s not in a position to gain the benefit of 17(b) relief.”

On this record, we are satisfied the trial court properly exercised its sentencing authority. The court was aware of its discretionary authority and stated valid reasons for its decision. The record does not disclose any abuse of discretion. While defendant has

offered various reasons to disagree with the trial court's sentencing decision, he has failed to clearly show that the decision was irrational or arbitrary.

B. Sentence Imposed

Defendant contends the trial court abused its discretion in imposing the upper term on the corporal injury offense. According to defendant, reversal is warranted because the trial court inappropriately applied aggravating factors to impose the upper term and used facts both for punishment and to enhance defendant's sentence. We disagree.

A violation of section 273.5 is punishable by two, three, or four years in state prison, or not more than one year in county jail. (§ 273.5, subd. (a).) "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall set forth on the record the reasons for imposing the term selected" (§ 1170, subd. (b).)

When "selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Rule 4.420(b); see rules 4.421 [circumstances in aggravation] and 4.423 [circumstances in mitigation].) The trial court enjoys broad discretion in its sentencing decisions, which we review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We must affirm the lower court's sentencing decision "unless there is a clear showing the sentence choice was arbitrary or irrational." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) A defendant "bears a heavy burden" when attempting to show the trial court has abused its sentencing discretion. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.)

The trial court abuses its discretion "if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) " '[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria,

including any mitigating factors.’ [Citation.]” (*People v. King* (2010) 183 Cal.App.4th 1281, 1322.) “Under California’s determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term.” (*People v. Black* (2007) 41 Cal.4th 799, 813.)

As a threshold matter, we conclude defendant has forfeited his argument because he did not object in the trial on the same grounds he now raises on appeal. “[T]he waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.” (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*); see *People v. De Soto* (1997) 54 Cal.App.4th 1, 7-8 [applying *Scott* forfeiture rule to claim of improper dual use of facts to impose an upper term sentence].)

But even if defendant did not forfeit his argument, we conclude it lacks merit. Before announcing its intent to sentence defendant to the upper term of four years on the corporal injury offense, the trial court found that defendant was dangerous, was on probation for domestic violence and subject to a restraining order when the offense was committed, had served prior prison terms, had previously failed to comply with the conditions of his probation (including conditions requiring him to take anger management and alcohol education classes), had numerous prior convictions and a very serious criminal history, and had engaged in an act of violence against Jemal. In selecting the upper term, the trial court stated, “I’m choosing [the] upper term here because [defendant] took [Jemal’s] phone, he took money, he fled, and he had jailhouse

calls,⁵ and the contacts were not favorable to him, and he was on probation at the time of the criminal protective order. [¶] I think in addition to his criminal record that we've talked about, upper base of four years will be imposed." After hearing argument from defense counsel, the trial court explained that it gave "great weight to the fact that [defendant] was on probation for domestic violence against [Jemal] in addition to the fact that he has two prior strikes and a gun offense that's a felony" The court further explained that it reached its sentencing decision after considering defendant's prior performance on probation, defendant's history of violent conduct, and the fact that defendant had served a prior prison term. The court also noted that it considered "in great detail," the factors set forth in rules 4.423 and 4.421.

We conclude the trial court's sentencing decision is amply supported by the record and is not an abuse of discretion. The court considered the relevant factors in sentencing defendant and determined that an upper term sentence was appropriate based on the presence of a number of valid aggravating circumstances, including defendant's history of violent conduct indicating he is a serious danger to society, his numerous prior convictions, his unsatisfactory performance on probation, and the fact that he had served

⁵ While defendant was in custody, he and Jemal spoke over the phone on several occasions. Audio recordings of these conversations were played for the jury. The record does not contain a transcript of the conversations between defendant and Jemal. However, the record reflects that Jemal was upset and angry during the phone calls because she was hurt by defendant. During closing arguments, the prosecutor discussed the phone calls between defendant and Jemal, noting that defendant never denied Jemal's statements claiming that he had hit her and had "beat[en] her like a man." The prosecutor also noted that Jemal had told defendant that she was all swollen and in pain because he had beat her.

a prior prison term and was on probation when the offense was committed.⁶ (See rule 4.421(b).)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

MAURO, J.

⁶ The trial court also recognized that defendant committed the corporal injury offense in front of his daughter. As the People correctly point out, this constitutes a circumstance in aggravation for sentencing purposes. (§ 1170.76.)